# WEST VIRGINIA
# SECRETARY OF STATE
**KEN HECHLER**
# ADMINISTRATIVE LAW DIVISION

Form #6

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: Agriculture TITLE NUMBER: 61

AMENDMENT TO AN EXISTING RULE: YES___, NO_X_

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 6B

TITLE OF RULE BEING PROPOSED: Primary and Secondary Containment of Fertilizers

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) House Bill 100

SECTION 64-9-1(mm), PASSED ON May 26, 1993.

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: July 1, 1993

Robert B. Moore

5.80

and 60 minutes."

(jj) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-fourth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (licensing of livestock dealers), are authorized.

(kk) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred ninety-two, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the eighteenth day of November, one thousand nine hundred ninety-two, relating to the commissioner of agriculture (commercial feed), are authorized.

(ll) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred ninety-two, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the nineteenth day of February, one thousand nine hundred ninety-three, relating to the commissioner of agriculture (general groundwater protection rules for fertilizers and manures), are authorized.

Title 61-6B

Ad.

(mm) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred ninety-two, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the nineteenth day of February, one thousand nine hundred ninety-three, relating to the commissioner of agriculture (primary and secondary containment of fertilizers), are authorized with the amendments set forth below:

"On page five, by striking out all of subsection 5.5 and inserting in lieu thereof a new subsection 5.5 to read as

follows: 'The operator or his licensed representative shall sign and date each application under oath.'; and

On page eighteen, by striking out all of subsection 14.1 and inserting in lieu thereof a new subsection 14.1 to read as follows:

'All moneys for the purpose of the enforcement and administration of this rule shall come from general revenue funds appropriated by the legislature for that purpose. The net proceeds of civil penalties collected pursuant to W.Va. Code §20-5M-10a or any civil administrative penalties collected pursuant to W.Va. Code §20-5M-10c will be deposited in the groundwater remediation fund established in W.Va. Code §20-5M-1. et. seq.'".

(nn) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred ninety-two, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the nineteenth day of February, one thousand nine hundred ninety-three, relating to the commissioner of agriculture (general groundwater protection rules for pesticides), are authorized.

(oo) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred ninety-two, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the nineteenth day of February, one thousand nine hundred ninety-three, relating to the commissioner of agriculture (bulk pesticide operational rules), are authorized.

(pp) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred ninety-two, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the nineteenth day of February, one thousand nine hundred ninety-three, relating to the commissioner of agriculture (non-bulk pesticide rules for

TITLE 61

WEST VIRGINIA DEPARTMENT OF AGRICULTURE

SERIES 6B
PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS

## §61-6B-1. General

1.1 Scope. - These rules establish primary and secondary containment standards for fertilizers for the purpose of protecting the groundwater resources of the state of West Virginia.

1.2 Authority - WV Code 20-5M-5-c

1.3 Filing Date. - September 15,1992

1.4 Effective Date. - July 1,1993

1.5 This is a new legislative rule.

## §61-6B-2. Definitions

2.1. "Abandoned container" means a storage container or other container used at a storage facility to hold fluid bulk fertilizer or fertilizer rinsate that has been out of service for more than 6 months because of a weakness or leak, or has been out of service for any reason for more than 2 years and no integrity test has been performed.

2.2. "Approved" means approval by the commissioner except where otherwise stated.

2.3. "Aqua ammonia" means an aqueous solution of anhydrous ammonia generally containing from 18 to 30 percent of ammonia ($NH_3$) by weight and having a vapor pressure usually varying from 0 to 10 psig at 104 degrees F.

2.4. "Commissioner" means the Commissioner of the West Virginia Department of Agriculture or his appointed agent.

2.5. "Discharge" means a release outside the secondary containment area of fluid fertilizer in a quantity exceeding fifty-five (55) U.S. gallons and/or of dry bulk fertilizer in a quantity exceeding two hundred (200) pounds, unless otherwise specified in The Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. 9601, Title III Emergency Planning and Community Right-to-Know provisions. The term discharge does not include the normal loading and transportation of fertilizers from the facility or the lawful

distribution use, disposal or application of fertilizers.

2.6. "Dry bulk fertilizer" means nonfluid fertilizer in nonpackaged form.

2.7. "Elephant ring" means a storage container with open top serving as a secondary containment vessel into which a smaller primary storage container(s) is placed.

2.8. "Fertilizer" means any substance containing one or more recognized plant nutrients which is used for its plant nutrient content and which is designed for use or claimed to have value in promoting plant growth, except unmanipulated animal and vegetable manures, marl, lime, limestone, wood ashes, gypsum and other products exempted by regulation of the commissioner.

2.9. "Field operations" means the application of fertilizer to soil or plants in the course of normal agricultural or horticultural practice.

2.10. "Fluid bulk fertilizer" means fluid fertilizer in an undivided quantity exceeding 55 gallons.

2.11. "Fluid fertilizer" means fertilizer in fluid form, and includes solutions, emulsions, suspensions and slurries. "Fluid fertilizer" does not include anhydrous ammonia.

2.12. "Load or loading" means the transfer of bulk fertilizer from the storage facility to transport vehicles, application equipment, or mobile containers, unless the use of the word in the context means otherwise.

2.13. "Low pressure nitrogen solutions" means an aqueous solution of ammonium nitrate and/or urea and/or other nitrogen carriers, containing various quantities of free ammonia exceeding two percent (2%) by weight. Aqua ammonia and non-pressure nitrogen solutions commonly referred to as 28%, 30%, or 32% nitrogen solutions are excluded from this definition.

2.14. "Operational area" means an area or areas at a fertilizer storage facility where fertilizers are transferred, loaded, unloaded, mixed, or where fertilizers are cleaned or washed from application equipment, storage containers, or transportation equipment.

2.15. "Operational area containment" means any structure or system designed and constructed to intercept and contain operational spills, including container or equipment wash water and rainwater, and to prevent runoff or leaching from a storage facility.

2.16. "Operator" means any person who is responsible for the transferring, loading, unloading, mixing and/or storing of fertilizers and may include an owner, operator or manager.

2.17. "Person" means an individual, partnership, association, firm or corporation.

2.18. "Primary containment" means the storage of fluid or dry bulk fertilizer in storage containers at a storage facility.

2.19. "Roofed" means protected from precipitation and any subsequent drainage.

2.20. "Secondary containment" means any structure used to contain product spills from primary storage containers and prevent runoff or leaching.

2.21. "Storage container" means:

2.21.a. a container used for the storage of fluid or dry bulk fertilizer; or

2.21.b. a rail car, nurse tank, or other mobile container used for the storage of fluid bulk or dry fertilizer; but does not include

2.21.b.A. a mobile container storing fluid bulk or dry fertilizer at a storage facility for less than 15 days, if this storage is incidental to the loading or unloading of a storage container at the storage facility,

2.21.b.B. a mobile container located on property not owned, operated or controlled by an operator of a storage facility, nor

2.21.b.C. a container used solely for short-term emergency storage of leaking fertilizer containers.

2.22. "Storage facility" means a location at which fluid bulk fertilizer in undivided quantities in excess of 5,000 (five thousand) U.S. gallons or dry bulk fertilizer in undivided quantities exceeding 25 (twenty five) tons is held in storage where the total quantity of the product at the firm may be divided into more than one storage container and still be considered "undivided"; and where that storage occurs for more than a total of 30 (thirty) days during a 12 (twelve) month period.

2.23. "Unload or unloading" means the transfer of bulk fertilizer in an unaltered state from the transport vehicle to the storage facility.

**§61-6B-3. General program and policy.**

3.1. Every operator of a storage facility should utilize the services of a competent engineer for planning any construction or alterations to their operational area and that the publications "Environmental Handbook for Fertilizer and Agrichemical Dealers"

published by the Tennessee Valley Authority, TVA Technical Library, P.O.Box 1010, Muscle Shoals, AL 35660-1010 and "Designing Facilities for Pesticide and Fertilizer Containment" published by Midwest Plan Service, 122 Davidson Hall, Iowa State University, Ames, Iowa 50011-3080 be used to assist in the development of the planning and construction of operational areas.

3.2. Every operator of a storage facility should remove or mitigate existing contamination under the site of the proposed operational area that has the potential to contaminate groundwater prior to any construction or alteration to the operational area.

3.3. The operator shall be responsible for maintenance of the operational area to comply with these rules and in a manner adequate to minimize the risk of a discharge.

**§61-6B-4. Powers and duties of the commissioner.**

4.1. The commissioner:

4.1.a. may enter and inspect, during reasonable hours, any location where fertilizers are, or may be, stored in such quantities so as to come under these rules;

4.1.b. may take samples to determine compliance with these rules;

4.1.c. shall review design plans where appropriate to determine compliance with these rules;

4.1.d. may audit records of shipments of fertilizers, inspections, and maintenance;

4.1.e. shall promote the protection of groundwater through educational programs for operators;

4.1.f. shall collect and expend monies under the terms of this rule;

4.1.g. shall issue permits or deny permit applications;

4.1.h may conduct hearings, assess civil administrative penalties, seek injunctive relief or issue orders in accordance with §20-5M-10.

4.1.i. shall promulgate additional regulations as necessary to protect groundwater within the statutory mandates that may include but not limited to licensing and certification, operational management, closure, remediation and monitoring for water quality.

**§61-6B-5. Permits and Design Plans.**

5.1. All operators of a storage facility shall obtain and post a valid Fertilizer Storage Facility Permit prominently at the local office of the storage facility. One permit may apply to a storage facility that stores both dry bulk and fluid fertilizer.

5.2. Prior to the construction of primary or secondary storage, all persons shall obtain a Fertilizer Storage Facility Permit from the commissioner. The application shall be made at least 30 (thirty) days prior to the beginning of construction of the facility for firms that are not in operation on the effective date of this rule or within 6 (six) months of the effective date of this rule for any person operating a storage facility on the effective date of this rule.

5.3 Any person seeking to renew the Fertilizer Storage Facility Permit shall apply for a renewal within 15 (fifteen) days of the expiration date of the permit.

5.4. The commissioner shall furnish application forms containing the following information: the corporate or company name; the location; the mailing address; the phone number; the operator's name; the owner's name; and any other information relevant to the containment of bulk fertilizers.

5.5. The operator or his licensed representative shall sign and date each application under oath.

5.6. The commissioner shall issue a non-transferable Fertilizer Storage Facility Permit to each person meeting the requirements of this section. Each permit shall expire on June 30 following the date of issue.

5.7. The commissioner may deny any application for a Fertilizer Storage Facility Permit whenever the permit has been applied for fraudulently, the applicant has grossly interfered with the duties of the commissioner or the applicant is determined to be not in compliance with, or not able to comply with these rules.

5.8. The commissioner may suspend or revoke a Fertilizer Storage Facility Permit whenever the commissioner finds that a hazard to the environment exists, the permit has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or the permit holder has been dishonest, deceitful, incompetent or has not complied with or is unable to comply with the provisions of this rule. Any person whose Fertilizer Storage Facility Permit has been suspended or revoked shall immediately discontinue all operations covered under the permit.

5.8.a. The permit holder may resume operations covered by the Fertilizer Storage Facility Permit without reapplication for a permit at the end of the suspension period.

5.8.b. The permit holder must reapply for a permit following a revocation.

5.9. All persons with Fertilizer Storage Facility Permits shall submit design plans and specifications for construction to the commissioner 30 (thirty) days prior to the start of construction. All persons operating a storage facility on the effective date of this rule shall (within twelve months of the effective date of this rule) submit a description of the current facility and plans to bring the facility into compliance.

5.9.a. The commissioner may allow deviation from these specifications when they are clearly indicated on the design plans and a registered engineer certifies that the design plans and specifications will not reduce the effectiveness of the facility to protect groundwater.

5.9.b. The commissioner shall review all design plans and specifications and notify the person promptly when the plans do not comply with these rules. The review of these plans by the commissioner does not eliminate the responsibility of the operator for constructing and maintaining a facility that will protect the groundwater of this state.

5.10. Any person submitting design plans and specifications shall notify the commissioner promptly of any change to the design plans and specifications before proceeding with construction in accordance with the change.

**§61-6B-6. Inspection, Maintenance and Record Keeping Requirements**

6.1. The operator of the storage facility shall inspect the facility frequently enough to minimize the risk of discharge but not less than once a week during operational periods and not less than once a month during non-operational periods. The operator shall make a written record of the inspection made on the day of that inspection. All written records shall be maintained as follows:

6.1.a. a weekly record of the condition of valves for storage containers for fluid fertilizers when the containers are used for storage;

6.1.b. a weekly record of the condition of loading and unloading pads and catch basins during operational periods, or at least monthly during periods of non-use;

6.1.c. a monthly record of the fluid fertilizer levels in each storage container when in use and a comparison of the measured level versus the calculated level based on shipments in and out of the container;

6.1.d. a monthly record of the condition of primary

containers and elephant rings;

6.1.e. a semi-annual inventory reconciliation, showing the amount of fluid bulk fertilizer and dry bulk fertilizer from each storage container which is lost or unaccounted for at the end of each semi-annual period; and

6.1.f. other inspection records pertaining to the condition of storage containers, appurtenances, operational area containment, and secondary containment facilities.

6.2. The operator shall take immediate action when inspections determine non-compliance with these rules, or that a greater than minimal risk of a discharge exists. The operator shall create and maintain a written record of any maintenance the same day the maintenance is performed.

6.3. The operator of a storage facility shall maintain the records required by this rule for a minimum of 5 (five) years at each storage facility or at the nearest local office administering the storage facility. All records required by this rule shall be produced to the commissioner within 24 (twenty four) hours of any request.

**§61-6B-7. Discharge Response Plan**

7.1. The operator of a storage facility shall prepare a written Discharge Response Plan for the storage facility. The plan shall include:

7.1.a. the identity and telephone number of the persons or agencies who are to be contacted in the event of a discharge, including persons responsible for the stored fertilizer;

7.1.b. for each bulk fertilizer stored at the facility, a complete copy of the labeling required by WV Code §19-15-1 et seq. (except for the net weight);

7.1.c. an identification, by location, of every storage container located at the storage facility, and the type of fertilizer stored in each storage container;

7.1.d. for each type of bulk fertilizer stored at the facility, the procedures to be used in controlling and recovering, or otherwise responding to a discharge; and

7.1.e. procedures to be followed in using or disposing of a recovered discharge.

7.2. The operator shall keep the Discharge Response Plan current at all times.

7.3. The operator shall keep a copy of the Discharge Response Plan readily available at the storage facility or at the nearest

local office from which the storage facility is administered, and shall make the plan available for inspection and copying by the commissioner.

7.4. The commissioner shall require the operator of each facility existing on the effective date of this rule complete a Discharge Response Plan within 2 (two) years of the effective date of this rule.

## §61-6B-8. Storage and Handling of Dry Bulk Fertilizer

8.1. All dry bulk fertilizer in undivided quantities exceeding 25 (twenty five) tons shall be stored inside operational area containment structure(s) consisting of a sound structure or device having a cover or roof top, sidewalls, and a base sufficient to prevent contact with precipitation and surface waters.

8.2. Except for those procedures performed in the field of application, all persons loading, unloading, mixing or handling dry bulk fertilizer shall use a containment method, device, or structure suitable to prevent or minimize groundwater contamination. The containment method, device, or structure shall be of a size and design that contains the fertilizer and minimizes emission of dust and/or vapors beyond the facility boundaries. Any collected material shall be applied at agronomic fertilizer rates or otherwise recycled.

8.3. All operators shall promptly recover any dry bulk fertilizer which is spilled while being loaded to or from storage when the spillage would exceed a quantity greater than 200 (two hundred) pounds.

8.4. Containment devices, structures, or methods include, but are not limited to:

8.4.a. paving and curbing of outdoor handling areas with materials which allow for collection and recycling of the spilled products;

8.4.b. enclosing conveyors and equipping conveyors with dust control boots. Manually extendible boots may be adaptable to upright and auger type conveyors;

8.4.c. collection and recycling of product dust from rooftops of roof-filled storage structures; or

8.4.d. daily cleanup of the non-roofed areas each day when in use.

8.5. No person may store dry bulk fertilizer without a complete label, as required by WV Code §19-15-1 et seq. (except for the net weight) posted on the storage container.

8.6. No person may construct an operational area for dry bulk fertilizer storage in undivided quantities exceeding 25 tons closer than 100 feet from a wellhead, unless that operation is in use on the effective date of this rule.

8.7. No person may store dry bulk fertilizer on land with a reasonable expectation of having a flood event from a 25 year - 24 hour frequency storm, as defined by the National Weather Service, during the storage period unless the storage area is adequately protected from inundation by flooding.

8.8. All storage facilities for dry bulk fertilizer operating on the effective date of this rule are permitted 5 (five) years to fully comply with this rule as long as the operator submits a plan for full compliance with this rule within 2 (two) years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-9. Primary Containment: Storage Containers and Appurtenances for Fluid Fertilizer**

9.1. All fluid fertilizer shall be stored in storage containers and appurtenances that are:

9.1.a. constructed, installed and maintained to prevent the discharge of fluid fertilizer;

9.1.b. constructed of materials that are resistant to corrosion, puncture or cracking;

9.1.c. made or repaired with materials that do not react chemically or electrolytically with stored fluid fertilizer in a way which may weaken the storage container or appurtenances, or create a risk of discharge;

9.1.d. made with metals used for valves, fittings and repairs on metal containers that are compatible with the metals used in the construction of the storage container, so that the combination of metals does not cause or increase corrosion which may weaken the storage container or its appurtenances, or create a risk of discharge;

9.1.e. equipped with supports for pipes and fittings that are adequate to prevent sagging and breakage in the ordinary course of operations;

9.1.f. are protected against the risk of damage by trucks and other moving vehicles while loading or unloading fluid bulk fertilizer;

9.1.g. designed to handle all operating stresses including static head, pressure buildup from pumps and compressors,

and any other mechanical stresses to which the storage containers and appurtenances may be subject;

9.1.h. anchored to prevent flotation or instability caused by liquid accumulations within a secondary containment facility; and

9.1.i. equipped with a liquid level gauging device which shall be secured in a manner to protect against breakage or vandalism whereby the level of fluid in the storage container can be readily and safely determined;

9.1.i.A. this gauge is not required when the level of fluid in a storage container can be readily and reliably measured by another equally reliable and readily accessible means;

9.1.i.B. this gauge may be an external sight gauge only when the gauge is securely attached against the container wall and provided with a manually operated shut off valve which is locked in the shut off position when the level of fluid is not being determined.

9.2. No person may store fluid fertilizer in an underground or lined pit storage container, except for:

9.2.a. a watertight catch basin used for the temporary collection of runoff or rinsate from transfer, loading and unloading areas, and expeditiously emptied following use;or

9.2.b. a 316 or 317 stainless steel storage container; or

9.2.c. in another container approved by the commissioner prior to it's initial use, if the storage container is enclosed within an approved liner and an approved program of groundwater monitoring to detect leakage is established.

9.3. No person may store fertilizer in storage containers and appurtenances

9.3.a. that are constructed of copper, brass, zinc, or copper base alloys;

9.3.b. used for the storage of fluid fertilizers containing phosphates (>0.1%) or chlorides that are constructed of aluminum or aluminum alloys;

9.3.c. used for the storage of low ph (<5) fluid fertilizers that are constructed of ferrous materials other than stainless steel except when the materials are coated or treated with protective substances which are adequate to inhibit corrosion;

9.3.d. used for the storage of low pressure nitrogen solutions that are constructed of mild steel, fiberglass, polyolefins or plastic;

9.3.e. used for the storage of phosphoric acid that are constructed of ferrous materials other than 316 or 317 (or superior) stainless steel except when container is lined with a suitable substance to prevent corrosion; or

9.3.f. used for the storage of fluid fertilizers containing potassium chloride (muriate of potash) that are constructed of ferrous materials other than stainless steel, except when:

9.3.f.A. the containers and appurtenances are coated or treated with protective substances that inhibit corrosion; or

9.3.f.B. the container or appurtenance is used for storage periods of not more than 6 (six) months, is completely emptied between storage periods, and is cleaned and inspected for leaks prior to being refilled for any subsequent period.

9.4. All fluid fertilizers shall be stored such that:

9.4.a. storage containers and appurtenances are fenced or otherwise secured to provide protection from wildlife, vandalism and unauthorized access which may result in a discharge;

9.4.b. valves on storage containers containing fluid fertilizers are locked or otherwise secured except when persons responsible for facility security are present at the facility; and

9.4.c. valves on rail cars, nurse tanks, and other mobile fertilizer containers containing fluid fertilizer parked overnight at a storage facility are locked or secured except when persons responsible for facility security are present at the facility.

9.5. No person may fill storage containers beyond the capacity for which they are designed, taking into account the density of the fluid being stored and thermal expansion during storage.

9.6. No person may store fluid fertilizer in a storage container without a clear and prominent label identifying the contents of the storage container with the requirements of WV Code §19-15-1 et seq. (except for the net weight).

9.7. No person may store fluid fertilizers on land that has a reasonable expectation of having a flood event resulting from a 25 year - 24 hour frequency storm, as defined by the National Weather Service, during the storage period unless the storage area is adequately protected from inundation by flooding.

9.8. No person may construct an operational area for fluid fertilizers closer than 100 (one hundred) feet from a wellhead, unless that operation is in use on the effective date of this rule.

9.9. Any person owning an abandoned underground container, or abandoned underground catch basin shall thoroughly clean and remove it from the ground or thoroughly clean and fill it with an inert solid and shall maintain a permanent record of size, location, and method of closing at the storage facility or at the nearest office from which the storage facility is administered.

9.10. Any person owning an abandoned container or abandoned catch basin, whether underground or not, shall disconnect and seal all connections and vents and secure all hatches and sever and/or seal all valves and connections.

9.11. A secondary containment facility is not abandoned merely because there have been no operational spills into the secondary containment facility.

9.12. All facilities that are in operation on the effective date of this rule shall be permitted 3 (three) years to fully comply with this section of the rule when the operator submits a plan for full compliance with this section of the rule within 2 (two) years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-10. Operational Area Containment for Fluid Fertilizer**

10.1. All fluid fertilizer shall be stored such that all loading and unloading of fluid bulk fertilizer shall be on an area which is curbed and paved with asphalt or concrete. The curbed and paved area shall provide an impervious surface and

10.1.a. be of sufficient size to hold the entire mobile container during loading and unloading; and

10.1.b. be designed, constructed and maintained to handle all loading conditions to which it is exposed; and

10.1.c. be maintained by keeping all cracks and seams sealed and be impervious to leakage from any spillage.

10.2. Materials other than asphalt and concrete may be used only after they have been approved by the commissioner.

10.3. This section shall not apply to mobile containers used to nurse field operations when at a field unloading site.

10.4. All operational area containments shall have a curbed and paved surface that drains into a liquid-tight catch basin

10.4.a. that is of adequate design and size to contain a minimum of one thousand five hundred (1,500) gallons of an operational spill when at least one person is available during the entire loading and unloading process that is capable of stopping

the loading or unloading process in the case of an operational spill; when no person is available to monitor the loading and unloading, the design and size shall be adequate to contain a total of 110% of the volume of the largest vehicle to be loaded or unloaded; and

10.4.b. which may include a sump and an above-ground container, only when a pump is installed for transfers of the contents into the above-ground container.

10.5. All operators shall promptly recovering any operational spill from the operational area containment so that the capacity required in this section is available at all times.

10.6. All operators shall maintain the operational containment area free of debris and foreign matter.

10.7. All facilities that are in operation on the effective date of this rule shall be permitted 3 (three) years to fully comply with this section of the rule as long as the operator submits a plan for full compliance with this section of the rule within 2 (two) years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-11. Secondary Containment of Fluid Bulk Fertilizer - Dikes and Elephant Rings.**

11.1. All primary storage of fluid bulk fertilizers shall be located within a diked area constructed with a base, perimeter wall and sloped floor drain or within an elephant ring as provided by this section.

11.2. No person may use the diked area for storage of products other than fluid bulk fertilizers and equipment used in the operational area. Adjoining secondary containment areas may share common walls.

11.3. All operators must maintain the minimum capacity requirement at all times. The minimum capacity requirement for the diked area for containment shall contain, below the height of the dike, 125% of the volume of the largest storage container within the diked area plus the submerged portions of all other storage containers, fixtures, and materials in the area. (The minimum capacity when the diked area is covered to prevent the accumulation of rainfall is a capacity equal to 100% of the volume of the largest container.)

11.4. Except where used as a method of monitoring the integrity of a secondary containment system, drainage tile within or underlying the area to be diked shall be eliminated.

11.5. All dikes providing secondary containment shall meet

the following requirements:

11.5.a. the walls of a secondary containment facility shall be constructed of earth, steel, concrete or solid masonry, or other material specifically approved by the commissioner, and be designed to withstand a full hydrostatic head of any discharged fluid and weight load of material used in construction;

11.5.b. cracks and seams shall be sealed to prevent leakage;

11.5.c. walls constructed of earth or other permeable materials shall be lined as provided in this section;

11.5.d. earthen walls shall have a horizontal-to-vertical slope of at least 3 (three) to 1 (one), unless a steeper slope is consistent with good engineering practice, and shall be packed and protected from erosion;

11.5.e. the top of earthen walls shall be no less than 2.5 (tow and one half) feet wide;

11.5.f. walls may exceed 6 (six) feet in height above interior grade only when provisions are made for normal access and necessary emergency access to tanks, valves and other equipment, and for safe exit from the secondary containment facility;

11.5.g. walls constructed of concrete or solid masonry shall rest upon a floating base of concrete prepared as in this section or upon suitable concrete footings which extend below the average frost depth to provide structural integrity;

11.5.h. the base of a secondary containment facility, and any earthen walls of the facility shall be lined with asphalt, concrete, an approved synthetic liner, or a clay soil liner designed to limit permeability of the base and walls. Liners shall meet the following requirements.

11.5.h.A. Asphalt or concrete liners shall be designed to withstand any loading conditions, including a full hydrostatic head of discharged fluid and static loads of storage containers, including appurtenances, equipment, and contents. Cracks and seams shall be sealed to prevent leakage.

11.5.h.B. Synthetic liners and installation plans shall be approved by the commissioner. All requests for approval shall include a written confirmation from the manufacturer of suitability including compatibility with the stored materials, and a written estimate of the life of the liner. Synthetic liners shall have a minimum thickness of 30 (thirty) mils (0.8 millimeters); and shall be installed under the supervision of a qualified representative of the manufacturer or a professional engineer. All field constructed seams shall be tested, and repaired if necessary, in accordance with the manufacturer's

recommendations.

11.5.h.C. Soil liners shall be constructed by sealing the surface of the soil, including the berm of an earthen dike with a sealing agent such as sodium bentonite, attapulgite or a similar clay material. The soil liner shall be constructed in accordance with civil engineering practices, to achieve a coefficient of permeability not to exceed $1.0 \times 10^{-6}$ cm/sec, with a thickness of not less than 6 (six) inches. The floor of the containment area within the soil liner shall be protected with a layer of gravel or crushed stone at least 6 (six) inches thick placed on top of the clay liner.

11.6. A liner need not be installed directly under a storage container having a capacity of one hundred thousand (100,000) U.S. gallons or more which has been constructed on site and put into use prior to the effective date of this rule when an official of the company which owns the storage container certifies in writing to the commissioner that one of the following alternative procedures has been complied with.

11.6.a. Alternative 1: The original bottom of the storage container shall be tested for leaks before the sand layer and second bottom are installed. A second bottom made of steel shall be constructed for the storage container. The second bottom shall be placed over the original bottom and a layer of smooth, fine gravel or coarse sand having a minimum thickness of three (3) inches. The newly constructed bottom shall be tested for leaks before any fluid fertilizer is stored on the newly constructed bottom. A record of all tests shall be filed at the storage facility, or at the nearest local office from which the storage facility is administered.

11.6.b. Alternative 2: The container shall be emptied, cleaned, and tested for leaks. The walls and floor of the container shall be tested to assure that welds and thickness of steel plates are sound and adequate to contain the fertilizers. A record of the inspection, test results, and of any repairs made shall be submitted to the control official and maintained by the operator. The interior floor and wall areas of the container shall be coated with a liner to inhibit corrosion. A record of this procedure shall be submitted to the commissioner and maintained by the operator. A test for leaks and liner deterioration shall be conducted every five (5) years thereafter. A record of the test findings and of indicated repairs and maintenance shall be maintained by the operator.

11.6.c. Alternative 3: Monitoring devices shall be installed in angled borings under each tank. These monitoring devices shall constitute a leak detection system for each tank in advance of the point at which any leak would reach groundwater. The number, length, and depth of each boring shall be determined on the basis of site characteristics. The array of monitoring devices under each tank shall constitute the best practical early warning

detection system for tank leakage. Each monitoring plan under this alternative shall be implemented only upon review and approval of the commissioner.

11.7. Rail cars that are periodically moved into and out of the storage facility shall not be required to have secondary containment structures.

11.8. Individual storage containers not exceeding three thousand (3,000) gallons may be contained within an "elephant ring" in lieu of a diked secondary containment area only when:

11.8.a. both the primary storage container and the elephant ring are fabricated of material compatible with each other and with the fertilizer being stored;

11.8.b. provisions are made to prevent corrosion when dissimilar metals are used that may contribute to electrolytic corrosion between the primary storage container and the elephant ring;

11.8.c. the height of the elephant ring wall does not exceed 4 (four) feet unless provisions are made for escape should flooding occur;

11.8.d. the volume contained within the secondary storage walls of the elephant ring up to the working height of the elephant ring is sufficient to contain a volume 15% (fifteen percent) greater than the volume contained in the primary storage container plus the volume displaced by the footings of any equipment (i.e. pumps, meters, etc.) placed within the secondary containment vessel;

11.8.e. the elephant ring is maintained free of leaks and structural defects at all times;

11.8.f. the base is protected from corrosion, both from inside and outside the ring, and is underlain by a concrete pad or with eight inches of compacted gravel beneath four inches of compacted sand, or clay, or as recommended by the manufacturer of the elephant ring and approved by the commissioner;

11.8.g. all piping connections to the primary storage container are made over the wall of the elephant ring and are adequately supported and braced;

11.8.h. there is a sump pump within the elephant ring or an exterior portable pump available for removing operational discharges; and

11.8.i. pumps and other fixtures, if located within the elephant ring containment structure, are placed on an elevated platform above the top of the elephant ring or otherwise protected from flooding.

11.9. All facilities that are in operation on the effective date of this rule shall be permitted 3 (three) years to fully comply with this section of the rule as long as the operator submits a plan for full compliance with this section of the rule within 2 (two) years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-12. Drainage from Secondary Containment Areas.**

12.1. No person may operate a diked secondary containment area with a relief outlet and valve.

12.2. All diked earthen or prefabricated secondary containment areas shall have a base that slopes to a collecting spot where storm water can be discharged by a manually-operated pump over the berm for use in the blending process or for proper disposal in accordance with local requirements for disposal of storm water.

12.3. All asphalt or concrete lined secondary containment areas shall

12.3.a. have a recessed catch drain running through the center of the base; or

12.3.b. have a sump located within the containment area, that shall have no valve plumbed into the sump unless that sump is a part of a permanent recessed catch drain as specified in this section.

12.4. Storm water or other drainage may be removed from the secondary containment area when it is used for makeup water in fertilizer mixes or disposed of in accordance with local requirements when the water is free of chemical residues that could contaminate groundwater.

12.5. No operator may use a collection tank as a storage area.

12.6. All operators shall remove operational spills from the secondary containment area promptly.

**§61-6B-13. Hearings, penalties, orders and injunctive relief.**

13.1. The commissioner may conduct hearings, assess civil administrative penalties, seek injunctive relief and issue orders in accordance with §20-5M-10 and §20-5M-11.

## §61-6B-14. Special revenue account and Groundwater remediation fund.

14.1. All monies for the purpose of the enforcement and administration of this rule shall come from general revenue funds appropriated by the legislature for that purpose. The net proceeds of civil penalties collected pursuant to W.Va. Code §20-5M-10a or any civil administrative penalties collected pursuant to W.Va. Code §20-5M-10c will be deposited in the groundwater remediation fund established in W.Va. Code §20-5M-1 et.seq.

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# STATE OF WEST VIRGINIA

## SECRETARY OF STATE

Building 1, Suite 157-K
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Charleston, WV 25305-0770



TO: John Liggett

AGENCY: Department of Agriculture

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: August 30, 1993

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

**PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.**

SERIES: 6B TITLE: 61 Department of Agriculture

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

**********

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: John Liggett

TITLE OF PERSON SIGNING: Assistant Director of Field Services

DATE: September 9, 1993

**NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.**

# TITLE 61
# LEGISLATIVE RULE
# DEPARTMENT OF AGRICULTURE

## SERIES 6B
## PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS

**§61-6B-1. General.**

1.1. Scope. -- These rules establish primary and secondary containment standards for fertilizers for the purpose of protecting the groundwater resources of the state of West Virginia.

1.2. Authority. -- W. Va. Code §20-5M-5-c

1.3. Filing Date. -- June 24, 1993

1.4. Effective Date. -- July 1, 1993

**§61-6B-2. Definitions.**

2.1. "Abandoned container" means a storage container or other container used at a storage facility to hold fluid bulk fertilizer or fertilizer rinsate that has been out of service for more than 6 months because of a weakness or leak, or has been out of service for any reason for more than 2 years and no integrity test has been performed.

2.2. "Approved" means approval by the commissioner except where otherwise stated.

2.3. "Aqua ammonia" means an aqueous solution of anhydrous ammonia generally containing from 18 to 30 percent of ammonia (NH3) by weight and having a vapor pressure usually varying from 0 to 10 psig at 104 degrees F.

2.4. "Commissioner" means the Commissioner of the West Virginia Department of Agriculture or his appointed agent.

2.5. "Discharge" means a release outside the secondary containment area of fluid fertilizer in a quantity exceeding fifty- five (55) U.S. gallons and/or of dry bulk fertilizer in a quantity exceeding two hundred (200) pounds, unless otherwise specified in The Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. 9601, Title III Emergency Planning and Community Right-to-Know provisions. The term discharge does not include the normal loading and transportation of fertilizers from the facility or the lawful distribution use, disposal or application of fertilizers.

2.6. "Dry bulk fertilizer" means nonfluid fertilizer in nonpackaged form.

2.7. "Elephant ring" means a storage container with open top serving as a secondary containment vessel into which a smaller primary storage container(s) is placed.

2.8. "Fertilizer" means any substance containing one or more recognized plant nutrients which is used for its plant nutrient content and which is designed for use or claimed to have value in promoting plant growth, except unmanipulated animal and vegetable manures, marl, lime, limestone, wood ashes, gypsum and other products exempted by regulation of the commissioner.

2.9. "Field operations" means the application of fertilizer to soil or plants in the course of normal agricultural or horticultural practice.

2.10. "Fluid bulk fertilizer" means fluid fertilizer in an undivided quantity exceeding 55 gallons.

2.11. "Fluid fertilizer" means fertilizer in fluid form, and includes solutions, emulsions, suspensions and slurries. "Fluid fertilizer" does not include anhydrous ammonia.

2.12. "Load or loading" means the transfer of bulk fertilizer from the storage facility to transport vehicles, application equipment, or mobile containers, unless the use of the word in the context means otherwise.

2.13. "Low pressure nitrogen solutions" means an aqueous solution of ammonium nitrate and/or urea and/or other nitrogen carriers, containing various quantities of free ammonia exceeding two percent (2%) by weight. Aqua ammonia and non-pressure nitrogen solutions commonly referred to as 28%, 30%, or 32% nitrogen solutions are excluded from this definition.

2.14. "Operational area" means an area or areas at a fertilizer storage facility where fertilizers are transferred, loaded, unloaded, mixed, or where fertilizers are cleaned or washed from application equipment, storage containers, or transportation equipment.

2.15. "Operational area containment" means any structure or system designed and constructed to intercept and contain operational spills, including container or equipment wash water and rainwater, and to prevent runoff or leaching from a storage facility.

2.16. "Operator" means any person who is responsible for the transferring, loading, unloading, mixing and/or storing of fertilizers and may include an owner, operator or manager.

2.17. "Person" means an individual, partnership, association, firm or corporation.

2.18. "Primary containment" means the storage of fluid or dry bulk fertilizer in storage containers at a storage facility.

2.19. "Roofed" means protected from precipitation and any subsequent drainage.

2.20. "Secondary containment" means any structure used to contain product spills from primary storage containers and prevent runoff or leaching.

2.21. "Storage container" means:

2.21.1. a container used for the storage of fluid or dry bulk fertilizer; or

2.21.2. a rail car, nurse tank, or other mobile container used for the storage of fluid bulk or dry fertilizer; but does not include

a. a mobile container storing fluid bulk or dry fertilizer at a storage facility for less than 15 days, if this storage is incidental to the loading or unloading of a storage container at the storage facility,

b. a mobile container located on property not owned, operated or controlled by an operator of a storage facility, nor

c. a container used solely for short-term emergency storage of leaking fertilizer containers.

2.22. "Storage facility" means a location at which fluid bulk fertilizer in undivided quantities in excess of 5,000 (five thousand) U.S. gallons or dry bulk fertilizer in undivided quantities exceeding 25 (twenty five) tons is held in storage where the total quantity of the product at the firm may be divided into more than one storage container and still be considered "undivided"; and where that storage occurs for more than a total of 30 (thirty) days during a 12 (twelve) month period.

2.23. "Unload or unloading" means the transfer of bulk fertilizer in an unaltered state from the transport vehicle to the storage facility.

**§61-6B-3. General Program and Policy.**

3.1. Every operator of a storage facility should utilize the services of a competent engineer for planning any construction or alterations to their operational area and that the publications "Environmental Handbook for Fertilizer and Agrichemical Dealers" published by the Tennessee Valley Authority, TVA Technical Library, P.O.Box 1010, Muscle Shoals, AL 35660-1010 and "Designing Facilities for Pesticide and Fertilizer Containment" published by Midwest Plan Service, 122 Davidson Hall, Iowa State

University, Ames, Iowa 50011-3080 be used to assist in the development of the planning and construction of operational areas.

3.2. Every operator of a storage facility should remove or mitigate existing contamination under the site of the proposed operational area that has the potential to contaminate groundwater prior to any construction or alteration to the operational area.

3.3. The operator shall be responsible for maintenance of the operational area to comply with these rules and in a manner adequate to minimize the risk of a discharge.

**§61-6B-4. Powers and Duties of the Commissioner.**

4.1. The commissioner:

4.1.1. may enter and inspect, during reasonable hours, any location where fertilizers are, or may be, stored in such quantities so as to come under these rules;

4.1.2. may take samples to determine compliance with these rules;

4.1.3. shall review design plans where appropriate to determine compliance with these rules;

4.1.4. may audit records of shipments of fertilizers, inspections, and maintenance;

4.1.5. shall promote the protection of groundwater through educational programs for operators;

4.1.6. shall collect and expend monies under the terms of this rule;

4.1.7. shall issue permits or deny permit applications;

4.1.8. may conduct hearings, assess civil administrative penalties, seek injunctive relief or issue orders in accordance with W. Va. Code §20-5M-10.

4.1.9. shall promulgate additional regulations as necessary to protect groundwater within the statutory mandates that may include but not limited to licensing and certification, operational management, closure, remediation and monitoring for water quality.

**§61-6B-5. Permits and Design Plans.**

5.1. All operators of a storage facility shall obtain and post a valid Fertilizer Storage Facility Permit prominently at the local office of the storage facility. One permit may apply to a storage facility that stores both dry bulk and fluid fertilizer.

5.2. Prior to the construction of primary or secondary storage, all persons shall obtain a Fertilizer Storage Facility Permit from the commissioner. The application shall be made at least 30 (thirty) days prior to the beginning of construction of the facility for firms that are not in operation on the effective date of this rule or within 6 (six) months of the effective date of this rule for any person operating a storage facility on the effective date of this rule.

5.3. Any person seeking to renew the Fertilizer Storage Facility Permit shall apply for a renewal within 15 (fifteen) days of the expiration date of the permit.

5.4. The commissioner shall furnish application forms containing the following information: the corporate or company name; the location; the mailing address; the phone number; the operator's name; the owner's name; and any other information relevant to the containment of bulk fertilizers.

5.5. The operator or his licensed representative shall sign and date each application under oath.

5.6. The commissioner shall issue a non-transferable Fertilizer Storage Facility Permit to each person meeting the requirements of this section. Each permit shall expire on June 30 following the date of issue.

5.7. The commissioner may deny any application for a Fertilizer Storage Facility Permit whenever the permit has been applied for fraudulently, the applicant has grossly interfered with the duties of the commissioner or the applicant is determined to be not in compliance with, or not able to comply with these rules.

5.8. The commissioner may suspend or revoke a Fertilizer Storage Facility Permit whenever the commissioner finds that a hazard to the environment exists, the permit has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or the permit holder has been dishonest, deceitful, incompetent or has not complied with or is unable to comply with the provisions of this rule. Any person whose Fertilizer Storage Facility Permit has been suspended or revoked shall immediately discontinue all operations covered under the permit.

5.8.1. The permit holder may resume operations covered by the Fertilizer Storage Facility Permit without reapplication for a permit at the end of the suspension period.

5.8.2. The permit holder must reapply for a permit following a revocation.

5.9. All persons with Fertilizer Storage Facility Permits shall submit design plans and specifications for construction to the commissioner 30 (thirty) days prior to the start of construction. All persons operating a storage facility on the effective date of this rule shall (within twelve months of the effective date of this rule) submit a description of the current facility and plans to bring the facility into compliance.

5.9.1. The commissioner may allow deviation from these specifications when they are clearly indicated on the design plans and a registered engineer certifies that the design plans and specifications will not reduce the effectiveness of the facility to protect groundwater.

5.9.2. The commissioner shall review all design plans and specifications and notify the person promptly when the plans do not comply with these rules. The review of these plans by the commissioner does not eliminate the responsibility of the operator for constructing and maintaining a facility that will protect the groundwater of this state.

5.10. Any person submitting design plans and specifications shall notify the commissioner promptly of any change to the design plans and specifications before proceeding with construction in accordance with the change.

**§61-6B-6. Inspection, Maintenance and Record Keeping Requirements.**

6.1. The operator of the storage facility shall inspect the facility frequently enough to minimize the risk of discharge but not less than once a week during operational periods and not less than once a month during non-operational periods. The operator shall make a written record of the inspection made on the day of that inspection. All written records shall be maintained as follows:

6.1.1. a weekly record of the condition of valves for storage containers for fluid fertilizers when the containers are used for storage;

6.1.2. a weekly record of the condition of loading and unloading pads and catch basins during operational periods, or at least monthly during periods of non-use;

6.1.3. a monthly record of the fluid fertilizer levels in each storage container when in use and a comparison of the measured level versus the calculated level based on shipments in and out of the container;

6.1.4. a monthly record of the condition of primary containers and elephant rings;

6.1.5. a semi-annual inventory reconciliation, showing the amount of fluid bulk fertilizer and dry bulk fertilizer from each storage container which is lost or unaccounted for at the end of each semi-annual period; and

6.1.6. other inspection records pertaining to the condition of storage containers, appurtenances, operational area containment, and secondary containment facilities.

6.2. The operator shall take immediate action when inspections determine non-compliance with these rules, or that a greater than minimal risk of a discharge exists. The operator shall create and maintain a written record of any maintenance the same day the maintenance is performed.

6.3. The operator of a storage facility shall maintain the records required by this rule for a minimum of 5 (five) years at each storage facility or at the nearest local office administering the storage facility. All records required by this rule shall be produced to the commissioner within 24 (twenty four) hours of any request.

**§61-6B-7. Discharge Response Plan.**

7.1. The operator of a storage facility shall prepare a written Discharge Response Plan for the storage facility. The plan shall include:

7.1.1. the identity and telephone number of the persons or agencies who are to be contacted in the event of a discharge, including persons responsible for the stored fertilizer;

7.1.2. for each bulk fertilizer stored at the facility, a complete copy of the labeling required by W. Va. Code §19-15-1 et seq. (except for the net weight);

7.1.3. an identification, by location, of every storage container located at the storage facility, and the type of fertilizer stored in each storage container;

7.1.4. for each type of bulk fertilizer stored at the facility, the procedures to be used in controlling and recovering, or otherwise responding to a discharge; and

7.1.5. procedures to be followed in using or disposing of a recovered discharge.

7.2. The operator shall keep the Discharge Response Plan current at all times.

7.3. The operator shall keep a copy of the Discharge Response Plan readily available at the storage facility or at the nearest local office from which the storage facility is administered, and shall make the plan available for inspection and copying by the commissioner.

7.4. The commissioner shall require the operator of each facility existing on the effective date of this rule complete a Discharge Response Plan within 2 (two) years of the effective date of this rule.

**§61-6B-8. Storage and Handling of Dry Bulk Fertilizer.**

8.1. All dry bulk fertilizer in undivided quantities exceeding 25 (twenty five) tons shall be stored inside operational area containment structure(s) consisting of a sound structure or device having a cover or roof top, sidewalls, and a base sufficient to prevent contact with precipitation and surface waters.

8.2. Except for those procedures performed in the field of application, all persons loading, unloading, mixing or handling dry bulk fertilizer shall use a containment method, device, or structure suitable to prevent or minimize groundwater contamination. The containment method, device, or structure shall be of a size and design that contains the fertilizer and minimizes emission of dust and/or vapors beyond the facility boundaries. Any collected material shall be applied at agronomic fertilizer rates or otherwise recycled.

8.3. All operators shall promptly recover any dry bulk fertilizer which is spilled while being loaded to or from storage when the spillage would exceed a quantity greater than 200 (two hundred) pounds.

8.4. Containment devices, structures, or methods include, but are not limited to:

8.4.1. paving and curbing of outdoor handling areas with materials which allow for collection and recycling of the spilled products;

8.4.2. enclosing conveyors and equipping conveyors with dust control boots. Manually extendible boots may be adaptable to upright and auger type conveyors;

8.4.3. collection and recycling of product dust from rooftops of roof-filled storage structures; or

8.4.4. daily cleanup of the non-roofed areas each day when in use.

8.5. No person may store dry bulk fertilizer without a complete label, as required by W. Va. Code §19-15-1 et seq. (except for the net weight) posted on the storage container.

8.6. No person may construct an operational area for dry bulk fertilizer storage in undivided quantities exceeding 25 tons closer than 100 feet from a wellhead, unless that operation is in use on the effective date of this rule.

8.7. No person may store dry bulk fertilizer on land with a reasonable expectation of having a flood event from a 25 year - 24 hour frequency storm, as defined by the National Weather Service, during the storage period unless the storage area is adequately protected from inundation by flooding.

8.8. All storage facilities for dry bulk fertilizer operating on the effective date of this rule are permitted 5 (five) years to fully comply with this rule as long as the operator submits a plan for full compliance with this rule within 2 (two) years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-9. Primary Containment: Storage Containers and Appurtenances for Fluid Fertilizer.**

9.1. All fluid fertilizer shall be stored in storage containers and appurtenances that are:

9.1.1. constructed, installed and maintained to prevent the discharge of fluid fertilizer;

9.1.2. constructed of materials that are resistant to corrosion, puncture or cracking;

9.1.3. made or repaired with materials that do not react chemically or electrolytically with stored fluid fertilizer in a way which may weaken the storage container or appurtenances, or create a risk of discharge;

9.1.4. made with metals used for valves, fittings and repairs on metal containers that are compatible with the metals used in the construction of the storage container, so that the combination of metals does not cause or increase corrosion which may weaken the storage container or its appurtenances, or create a risk of discharge;

9.1.5. equipped with supports for pipes and fittings that are adequate to prevent sagging and breakage in the ordinary course of operations;

9.1.6. are protected against the risk of damage by trucks and other moving vehicles while loading or unloading fluid bulk fertilizer;

9.1.7. designed to handle all operating stresses including static head, pressure buildup from pumps and compressors, and any other mechanical stresses to which the storage containers and appurtenances may be subject;

9.1.8. anchored to prevent flotation or instability caused by liquid accumulations within a secondary containment facility; and

9.1.9. equipped with a liquid level gauging device which shall be secured in a manner to protect against breakage or vandalism whereby the level of fluid in the storage container can be readily and safely determined;

a. this gauge is not required when the level of fluid in a storage container can be

readily and reliably measured by another equally reliable and readily accessible means;

b. this gauge may be an external sight gauge only when the gauge is securely attached against the container wall and provided with a manually operated shut off valve which is locked in the shut off position when the level of fluid is not being determined.

9.2. No person may store fluid fertilizer in an underground or lined pit storage container, except for:

9.2.1. a watertight catch basin used for the temporary collection of runoff or rinsate from transfer, loading and unloading areas, and expeditiously emptied following use;or

9.2.2. a 316 or 317 stainless steel storage container; or

9.2.3. in another container approved by the commissioner prior to it's initial use, if the storage container is enclosed within an approved liner and an approved program of groundwater monitoring to detect leakage is established.

9.3. No person may store fertilizer in storage containers and appurtenances

9.3.1. that are constructed of copper, brass, zinc, or copper base alloys;

9.3.2. used for the storage of fluid fertilizers containing phosphates (>0.1%) or chlorides that are constructed of aluminum or aluminum alloys;

9.3.3. used for the storage of low ph (<5) fluid fertilizers that are constructed of ferrous materials other than stainless steel except when the materials are coated or treated with protective substances which are adequate to inhibit corrosion;

9.3.4. used for the storage of low pressure nitrogen solutions that are constructed of mild steel, fiberglass, polyolefins or plastic;

9.3.5. used for the storage of phosphoric acid that are constructed of ferrous materials other than 316 or 317 (or superior) stainless steel except when container is lined with a suitable substance to prevent corrosion; or

9.3.6. used for the storage of fluid fertilizers containing potassium chloride (muriate of potash) that are constructed of ferrous materials other than stainless steel, except when:

a. the containers and appurtenances are coated or treated with protective substances that inhibit corrosion; or

b. the container or appurtenance is used for storage periods of not more than 6 (six) months, is completely emptied between storage periods, and is cleaned and inspected for leaks prior to being refilled for any subsequent period.

9.4. All fluid fertilizers shall be stored such that:

9.4.1. storage containers and appurtenances are fenced or otherwise secured to provide protection from wildlife, vandalism and unauthorized access which may result in a discharge;

9.4.2. valves on storage containers containing fluid fertilizers are locked or otherwise secured except when persons responsible for facility security are present at the facility; and

9.4.3. valves on rail cars, nurse tanks, and other mobile fertilizer containers containing fluid fertilizer parked overnight at a storage facility are locked or secured except when persons responsible for facility security are present at the facility.

9.5. No person may fill storage containers beyond the capacity for which they are designed, taking into account the density of the fluid being stored and thermal expansion during storage.

9.6. No person may store fluid fertilizer in a storage container without a clear and prominent

label identifying the contents of the storage container with the requirements of W. Va. Code §19-15-1 et seq. (except for the net weight).

9.7. No person may store fluid fertilizers on land that has a reasonable expectation of having a flood event resulting from a 25 year - 24 hour frequency storm, as defined by the National Weather Service, during the storage period unless the storage area is adequately protected from inundation by flooding.

9.8. No person may construct an operational area for fluid fertilizers closer than 100 (one hundred) feet from a wellhead, unless that operation is in use on the effective date of this rule.

9.9. Any person owning an abandoned underground container, or abandoned underground catch basin shall thoroughly clean and remove it from the ground or thoroughly clean and fill it with an inert solid and shall maintain a permanent record of size, location, and method of closing at the storage facility or at the nearest office from which the storage facility is administered.

9.10. Any person owning an abandoned container or abandoned catch basin, whether underground or not, shall disconnect and seal all connections and vents and secure all hatches and sever and/or seal all valves and connections.

9.11. A secondary containment facility is not abandoned merely because there have been no operational spills into the secondary containment facility.

9.12. All facilities that are in operation on the effective date of this rule shall be permitted 3 (three) years to fully comply with this section of the rule when the operator submits a plan for full compliance with this section of the rule within 2 (two) years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-10. Operational Area Containment for Fluid Fertilizer.**

10.1. All fluid fertilizer shall be stored such that all loading and unloading of fluid bulk fertilizer shall be on an area which is curbed and paved with asphalt or concrete. The curbed and paved area shall provide an impervious surface and

10.1.1. be of sufficient size to hold the entire mobile container during loading and unloading; and

10.1.2. be designed, constructed and maintained to handle all loading conditions to which it is exposed; and

10.1.3. be maintained by keeping all cracks and seams sealed and be impervious to leakage from any spillage.

10.2. Materials other than asphalt and concrete may be used only after they have been approved by the commissioner.

10.3. This section shall not apply to mobile containers used to nurse field operations when at a field unloading site.

10.4. All operational area containments shall have a curbed and paved surface that drains into a liquid-tight catch basin

10.4.1. that is of adequate design and size to contain a minimum of one thousand five hundred (1,500) gallons of an operational spill when at least one person is available during the entire loading and unloading process that is capable of stopping the loading or unloading process in the case of an operational spill; when no person is available to monitor the loading and unloading, the design and size shall be adequate to contain a total of 110% of the volume of the largest vehicle to be loaded or unloaded; and

10.4.2. which may include a sump and an above-ground container, only when a pump is installed for transfers of the contents into the above-ground container.

10.5. All operators shall promptly recover~~ing~~ any operational spill from the operational area containment so that the

capacity required in this section is available at all times.

10.6. All operators shall maintain the operational containment area free of debris and foreign matter.

10.7. All facilities that are in operation on the effective date of this rule shall be permitted 3 (three) years to fully comply with this section of the rule as long as the operator submits a plan for full compliance with this section of the rule within 2 (two) years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-11. Secondary Containment of Fluid Bulk Fertilizer - Dikes and Elephant Rings.**

11.1. All primary storage of fluid bulk fertilizers shall be located within a diked area constructed with a base, perimeter wall and sloped floor drain or within an elephant ring as provided by this section.

11.2. No person may use the diked area for storage of products other than fluid bulk fertilizers and equipment used in the operational area. Adjoining secondary containment areas may share common walls.

11.3. All operators must maintain the minimum capacity requirement at all times. The minimum capacity requirement for the diked area for containment shall contain, below the height of the dike, 125% of the volume of the largest storage container within the diked area plus the submerged portions of all other storage containers, fixtures, and materials in the area. (The minimum capacity when the diked area is covered to prevent the accumulation of rainfall is a capacity equal to 100% of the volume of the largest container.)

11.4. Except where used as a method of monitoring the integrity of a secondary containment system, drainage tile within or underlying the area to be diked shall be eliminated.

11.5. All dikes providing secondary containment shall meet the following requirements:

11.5.1. the walls of a secondary containment facility shall be constructed of earth, steel, concrete or solid masonry, or other material specifically approved by the commissioner, and be designed to withstand a full hydrostatic head of any discharged fluid and weight load of material used in construction;

11.5.2. cracks and seams shall be sealed to prevent leakage;

11.5.3. walls constructed of earth or other permeable materials shall be lined as provided in this section;

11.5.4. earthen walls shall have a horizontal-to- vertical slope of at least 3 (three) to 1 (one), unless a steeper slope is consistent with good engineering practice, and shall be packed and protected from erosion;

11.5.5. the top of earthen walls shall be no less than 2.5 (tow and one half) feet wide;

11.5.6. walls may exceed 6 (six) feet in height above interior grade only when provisions are made for normal access and necessary emergency access to tanks, valves and other equipment, and for safe exit from the secondary containment facility;

11.5.7. walls constructed of concrete or solid masonry shall rest upon a floating base of concrete prepared as in this section or upon suitable concrete footings which extend below the average frost depth to provide structural integrity;

11.5.8. the base of a secondary containment facility, and any earthen walls of the facility shall be lined with asphalt, concrete, an approved synthetic liner, or a clay soil liner designed to limit permeability of the base and walls. Liners shall meet the following requirements.

a. Asphalt or concrete liners shall be designed to withstand any loading conditions, including a full hydrostatic head of discharged fluid and static loads of storage containers, including appurtenances, equipment, and contents. Cracks and seams shall be sealed to prevent leakage.

b. Synthetic liners and installation plans shall be approved by the commissioner. All requests for approval shall include a written confirmation from the manufacturer of suitability including compatibility with the stored materials, and a written estimate of the life of the liner. Synthetic liners shall have a minimum thickness of 30 (thirty) mils (0.8 millimeters); and shall be installed under the supervision of a qualified representative of the manufacturer or a professional engineer. All field constructed seams shall be tested, and repaired if necessary, in accordance with the manufacturer's recommendations.

c. Soil liners shall be constructed by sealing the surface of the soil, including the berm of an earthen dike with a sealing agent such as sodium bentonite, attapulgite or a similar clay material. The soil liner shall be constructed in accordance with civil engineering practices, to achieve a coefficient of permeability not to exceed 1.0 x 10-6 cm/sec, with a thickness of not less than 6 (six) inches. The floor of the containment area within the soil liner shall be protected with a layer of gravel or crushed stone at least 6 (six) inches thick placed on top of the clay liner.

11.6. A liner need not be installed directly under a storage container having a capacity of one hundred thousand (100,000) U.S. gallons or more which has been constructed on site and put into use prior to the effective date of this rule when an official of the company which owns the storage container certifies in writing to the commissioner that one of the following alternative procedures has been complied with.

11.6.1. Alternative 1: The original bottom of the storage container shall be tested for leaks before the sand layer and second bottom are installed. A second bottom made of steel shall be constructed for the storage container. The second bottom shall be placed over the original bottom and a layer of smooth, fine gravel or coarse sand having a minimum thickness of three (3) inches. The newly constructed bottom shall be tested for leaks before any fluid fertilizer is stored on the newly constructed bottom. A record of all tests shall be filed at the storage facility, or at the nearest local office from which the storage facility is administered.

11.6.2. Alternative 2: The container shall be emptied, cleaned, and tested for leaks. The walls and floor of the container shall be tested to assure that welds and thickness of steel plates are sound and adequate to contain the fertilizers. A record of the inspection, test results, and of any repairs made shall be submitted to the control official and maintained by the operator. The interior floor and wall areas of the container shall be coated with a liner to inhibit corrosion. A record of this procedure shall be submitted to the commissioner and maintained by the operator. A test for leaks and liner deterioration shall be conducted every five (5) years thereafter. A record of the test findings and of indicated repairs and maintenance shall be maintained by the operator.

11.6.3. Alternative 3: Monitoring devices shall be installed in angled borings under each tank. These monitoring de/ vices shall constitute a leak detection system for each tank in advance of the point at which any leak would reach groundwater. The number, length, and depth of each boring shall be determined on the basis of site characteristics. The array of monitoring devices under each tank shall constitute the best practical early warning detection system for tank leakage. Each monitoring plan under this alternative shall be implemented only upon review and approval of the commissioner.

11.7. Rail cars that are periodically moved into and out of the storage facility shall not be required to have secondary containment structures.

11.8. Individual storage containers not exceeding three thousand (3,000) gallons may be contained within an "elephant ring" in lieu of a diked secondary containment area only when:

11.8.1. both the primary storage container and the elephant ring are fabricated of material compatible with each other and with the fertilizer being stored;

11.8.2. provisions are made to prevent corrosion when dissimilar metals are used that may contribute to electrolytic corrosion between the primary storage container and the elephant ring;

11.8.3. the height of the elephant ring wall does not exceed 4 (four) feet unless provisions are made for escape should flooding occur;

11.8.4. the volume contained within the secondary storage walls of the elephant ring up to the working height of the elephant ring is sufficient to contain a volume 15% (fifteen percent) greater than the volume contained in the primary storage container plus the volume displaced by the footings of any equipment (i.e. pumps, meters, etc.) placed within the secondary containment vessel;

11.8.5. the elephant ring is maintained free of leaks and structural defects at all times;

11.8.6. the base is protected from corrosion, both from inside and outside the ring, and is underlain by a concrete pad or with eight inches of compacted gravel beneath four inches of compacted sand, or clay, or as recommended by the manufacturer of the elephant ring and approved by the commissioner;

11.8.7. all piping connections to the primary storage container are made over the wall of the elephant ring and are adequately supported and braced;

11.8.8. there is a sump pump within the elephant ring or an exterior portable pump available for removing operational discharges; and

11.8.9. pumps and other fixtures, if located within the elephant ring containment structure, are placed on an elevated platform above the top of the elephant ring or otherwise protected from flooding.

11.9. All facilities that are in operation on the effective date of this rule shall be permitted 3 (three) years to fully comply with this section of the rule as long as the operator submits a plan for full compliance with this section of the rule within 2 (two) years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-12. Drainage from Secondary Containment Areas.**

12.1. No person may operate a diked secondary containment area with a relief outlet and valve.

12.2. All diked earthen or prefabricated secondary containment areas shall have a base that slopes to a collecting spot where storm water can be discharged by a manually-operated pump over the berm for use in the blending process or for proper disposal in accordance with local requirements for disposal of storm water.

12.3. All asphalt or concrete lined secondary containment areas shall

12.3.1. have a recessed catch drain running through the center of the base; or

12.3.2. have a sump located within the containment area, that shall have no valve plumbed into the sump unless that sump is a part of a permanent recessed catch drain as specified in this section.

12.4. Storm water or other drainage may be removed from the secondary containment area when it is used for makeup water in fertilizer mixes or disposed of in accordance with local requirements when the water is free of chemical residues that could contaminate groundwater.

12.5. No operator may use a collection tank as a storage area.

12.6. All operators shall remove operational spills from the secondary containment area promptly.

**§61-6B-13. Hearings, Penalties, Orders and Injunctive Relief.**

13.1. The commissioner may conduct hearings, assess civil administrative penalties, seek injunctive relief and issue orders in accordance with W. Va. Code §§20-5M-10 and 20-5M-11.

**§61-6B-14. Special Revenue Account and Groundwater Remediation Fund.**

14.1. All monies for the purpose of the enforcement and administration of this rule shall come from general revenue funds appropriated by the legislature for that purpose. The net proceeds of civil penalties collected pursuant to W. Va. Code §20-5M-10a or any civil administrative penalties collected pursuant to W. Va. Code §20-5M-10c will be deposited in the groundwater remediation fund established in W. Va. Code §20-5M-1 et.seq.

KEN HECHLER
Secretary of State

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# STATE OF WEST VIRGINIA

## SECRETARY OF STATE

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May 28, 1993

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**HB 100** authorizing, **Title 61, Series 6B, Primary & Secondary Containment of Fertizilers,** passed the Legislature on **May 26, 1993.** It is now awaiting the Governor's signature.

You have sixty (60) days after the Governor signs HB 100, to final file the legislative rule with the Secretary of State's office. To final file your legislative rule, fill in the blanks on the enclosed form #6, the "Final Filing" form and file the form with our office. Authorization for your legislative rule is cited in **HB 100** section **64-9-1(mm).** The agency may set the effective date of the legislative rule up to ninety (90) days from the date the legislative rule is final filed with the Secretary of State's office. Please have an authorized signature on the bottom line.

***IMPORTANT: IF YOUR AGENCY HAS COMPLETED THE LEGISLATIVE RULE ON A COMPUTER SYSTEM THAT USES A 3 1/2" OR 5 1/4" DISK, **PLEASE SUBMIT A CLEAN COPY, WITH ALL UNDERLINING AND STRIKE-THROUGHS TAKEN OUT,** TO OUR OFFICE WHEN FINAL FILING THE RULE. STATE ON THE DISK THE FORMAT THE RULE IS IN AND THE TITLE IT IS FILED UNDER. THIS WILL MAKE IT QUICKER FOR US TO ENTER YOUR RULES ON THE LEGISLATIVE DATA BASE. REMEMBER THE TEXT OF THE COMPUTER FILED RULE **MUST** BE IDENTICAL - WORD FOR WORD, COMMA FOR COMMA, **WITH ALL UNDERLINING AND STRIKE-THROUGHS TAKEN OUT,** AS THE HARD COPY AUTHORIZED BY THE LEGISLATURE.

After the final rule is entered into the legislative data base, the rule will be sent to the agency for review and proofing. Following confirmation or corrections, as the case may be, the Secretary of State shall submit to the agency a final version of the rule for their records.

If you have any questions or need any assistance, please do not hesitate to call our office.

Thank You
Administrative Law Division

SENATE BILL NO. 221

(By Senator Manchin

[Introduced March 1, 1993; referred to the Committee on Agriculture; and then to the Committee on the Judiciary.]

A BILL to amend and reenact section one, article nine, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to authorizing the commissioner of agriculture to promulgate legislative rules relating to primary and secondary containment of fertilizers.

**Be it enacted by the Legislature of West Virginia:**

That section one, article nine, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, to read as follows:

**ARTICLE 9. AUTHORIZATION FOR MISCELLANEOUS AGENCIES AND BOARDS TO PROMULGATE LEGISLATIVE RULES.**

**§64-9-1. Commissioner of agriculture.**

(a) The legislative rules filed in the state register on the sixth day of April, one thousand nine hundred eighty-three,

relating to the commissioner of agriculture (schedule of charges for inspection services: fruit), are authorized.

(b) The legislative rules filed in the state register on the third day of August, one thousand nine hundred eighty-three, relating to the commissioner of agriculture (licensing of auctioneers), are authorized.

(c) The legislative rules filed in the state register on the eighth day of February, one thousand nine hundred eighty-four, relating to the commissioner of agriculture (conduct of beef industry self-improvement assessment program referendum), are authorized.

(d) The legislative rules filed in the state register on the fourth day of June, one thousand nine hundred eighty-four, relating to the commissioner of agriculture (feeding untreated garbage to swine), are authorized.

(e) The legislative rules filed in the state register on the fourth day of June, one thousand nine hundred eighty-four, relating to the commissioner of agriculture (registration, taxation and control of dogs), are authorized.

(f) The legislative rules filed in the state register on the first day of November, one thousand nine hundred eighty-four, relating to the commissioner of agriculture (public markets), are authorized.

(g) The legislative rules filed in the state register on the tenth day of September, one thousand nine hundred eighty-four,

relating to the commissioner of agriculture (noxious weed rules), are authorized.

(h) The legislative rules filed in the state register on the fourth day of June, one thousand nine hundred eighty-four, relating to the commissioner of agriculture (animal disease control), are authorized.

(i) The legislative rules filed in the state register on the fifth day of January, one thousand nine hundred eighty-four, relating to the commissioner of agriculture (use of certain picloram products), are authorized.

(j) The legislative rules filed in the state register on the eighth day of March, one thousand nine hundred eighty-five, relating to the commissioner of agriculture (increasing certain fees by rules and regulations), are authorized.

(k) The legislative rules filed in the state register on the thirteenth day of January, one thousand nine hundred eighty-six, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the thirty-first day of January, one thousand nine hundred eighty-six, relating to the commissioner of agriculture (licensing of livestock dealers), are authorized.

(l) The legislative rules filed in the state register on the eighteenth day of June, one thousand nine hundred eighty-six, modified by the commissioner of agriculture to meet the

objections of the legislative rule-making review committee and refiled in the state register on the fifth day of January, one thousand nine hundred eighty-seven, relating to the commissioner of agriculture (West Virginia pesticide use and application act), are authorized.

(m) The legislative rules filed in the state register on the eighteenth day of August, one thousand nine hundred eighty-six, modified by the director of the division of forestry of the department of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the fifth day of January, one thousand nine hundred eighty-seven, relating to the director of the division of forestry of the department of agriculture (ginseng), are authorized.

(n) The legislative rules filed in the state register on the tenth day of April, one thousand nine hundred eighty-seven, relating to the commissioner of agriculture (schedule of charges for inspection services: fruit), are authorized.

(o) The legislative rules filed in the state register on the thirteenth day of August, one thousand nine hundred eighty-seven, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the eighth day of September, one thousand nine hundred eighty-seven, relating to the commissioner of agriculture (animal disease control), are authorized.

(p) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred eighty-eight, relating to the commissioner of agriculture (sale and distribution of commercial fertilizer), are authorized.

(q) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred eighty-eight, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-sixth day of October, one thousand nine hundred eighty-eight, relating to the commissioner of agriculture (animal disease control), are authorized.

(r) The legislative rules filed in the state register on the fifteenth day of May, one thousand nine hundred eighty-nine, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-first day of August, one thousand nine hundred eighty-nine, relating to the commissioner of agriculture (production of milk and cream for manufacturing purposes), are authorized.

(s) The legislative rules filed in the state register on the seventh day of August, one thousand nine hundred eighty-nine, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-third day of October,

one thousand nine hundred eighty-nine, relating to the commissioner of agriculture (animal disease control), are authorized.

(t) The legislative rules filed in the state register on the tenth day of August, one thousand nine hundred ninety, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the fifth day of October, one thousand nine hundred ninety, relating to the commissioner of agriculture (meat inspection), are authorized.

(u) The legislative rules filed in the state register on the tenth day of August, one thousand nine hundred ninety, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the third day of October, one thousand nine hundred ninety, relating to the commissioner of agriculture (agricultural liming materials), are authorized.

(v) The legislative rules filed in the state register on the tenth day of August, one thousand nine hundred ninety, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the third day of October, one thousand nine hundred ninety, relating to the commissioner of agriculture (public markets), are authorized.

(w) The legislative rules filed in the state register on the nineteenth day of September, one thousand nine hundred ninety, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the ninth day of November, one thousand nine hundred ninety, relating to the commissioner of agriculture (animal disease control), are authorized.

(x) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-fourth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (commercial feed), are authorized with the amendments set forth below:

On page two, after subsection 3.3., by adding a new subsection, designated subsection 3.4., to read as follows:

"3.4. The commissioner will not assess a tonnage fee on any commercial feed or feed ingredients used in the manufacture of poultry contract feed.";

On page five, after subsection 4.3.m., by adding a new subsection, designated subsection 4.3.n., to read as follows:

"4.3.n. The commissioner will consider poultry contract feed to be customer-formula feed.";

And,

On page eight, after subsection 5.5., by adding a new subsection, designated subsection 5.6., to read as follows:

"5.6. Poultry contract feed labels shall conform to the requirements of W. Va. Code §19-14-8(d), except that:

5.6.a. The name of the grower or feeder will substitute for the requirements for the name of the purchaser; and,

5.6.b. The net weight (avoir dupois) of the commercial feed and each feed ingredient used in the feed shall not be required to be listed."

(y) The legislative rules filed in the state register on the fourth day of June, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the second day of August, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (wood destroying insect treatment standards), are authorized.

(z) The legislative rules filed in the state register on the twentieth day of December, one thousand nine hundred ninety, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the thirtieth day of April, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (fee structure for the pesticide control act of 1990), are authorized.

(aa) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twelfth day of November, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (animal disease control), are authorized.

(bb) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the tenth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (West Virginia plant pest act), are authorized.

(cc) The legislative rules filed in the state register on the twenty-sixth day of July, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the sixteenth day of October, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (licensing of pesticide businesses), are authorized.

(dd) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the

objections of the legislative rule-making review committee and refiled in the state register on the second day of October, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (certified pesticide applicators), are authorized.

(ee) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-fourth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (assessment of civil penalties and procedures for consent agreements and negotiated settlements), are authorized.

(ff) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-fourth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (aerial application of herbicides to rights-of-way), are authorized.

(gg) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and

refiled in the state register on the twenty-fourth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (frozen desserts and imitation frozen desserts), are authorized, with the amendment set forth below:

On page twelve, by striking out all of section 15 and substituting a new section 15, to read as follows:

**§61-4B-15. Enforcement policy.**

15.1. The commissioner may assess a violation of W. Va. Code §19-11B-1 et seq. or of these rules against the manufacturer of product and/or the distributor of the mix used to manufacture the product.

15.2. The commissioner will assess any violations of W. Va. Code §19-11B-1 et seq. or of this rule to the distributor for mix sampled from unopened containers. The company will not be assessed additional cumulative notices of violations until the commissioner has determined that the firm has had adequate notice of the previous notice, generally 10 days from the mailing of the notice of violation.

15.3. Whenever one of the last five consecutive official product sample(s) taken on separate days within a one year period are found to be adulterated or misbranded, the commissioner shall send a written "First Notice" to the manufacturer or distributor whichever is appropriate. This notice shall notify the manufacturer or distributor of the violation of W. Va. Code

§19-11B-1 et seq. or of these rules and the enforcement policy established by this section of the rule.

15.4. Whenever two of the last five consecutive official product sample(s) taken on separate days within a one year period are found to be adulterated or misbranded the commissioner shall send a written "Second Notice" to the manufacturer or distributor whichever is appropriate.

15.4.a. The commissioner shall collect additional official product sample(s) within 21 days of the sending of a Second Notice to the manufacturer or distributor, but shall not collect product samples before the lapse of 7 days from the sending of a Second Notice.

15.5. Whenever three of the last five consecutive official product sample(s) taken on separate days within a one year period are found to be adulterated or misbranded the commissioner shall send a written "Third Notice" to the manufacturer or distributor whichever is appropriate.

15.5.a. The commissioner shall collect additional official product sample(s) within 21 days of the sending of the Third Notice to the manufacturer or distributor, but shall not collect additional product samples before the lapse of 7 days from the date of sending of the notice.

15.6. The commissioner will issue a "Shut-down Order" for a period of 24 hours to a manufacturer or distributor when the record of the firm indicates that effective action has not been

taken to correct the causes of the violations, for instance when three out of the last five samples from the same machine are violative. The "Shut-down Order" will normally be issued with the "Third Notice". The "Shut-down Order" will give the reasons for the order, state the portion of the manufacturing or distributing operation that is prohibited from operating while the order is in effect, give conditions of the order, state the length of time that the Shut-down Order will be in effect and specify a time and place for a hearing to be held in this matter. Except that in the case where the public health, safety or welfare is at risk, the commissioner will issue an immediate Shut-down Order and give notice to the manufacturer or distributor under the provisions of subdivision 15.6.a. of this rule.

15.6.a. The commissioner will issue an immediate Shut-down Order without giving the manufacturer or distributor the opportunity to be heard where there is a hazard to the public health, safety or welfare. In these cases, the manufacturer or distributor will be given the opportunity to request a hearing before the commissioner after the notification of the order is received by the manufacturer or distributor. All Shut-down Orders issued due to noncompliance with subdivisions 8.1.c., 8.1.d. or 8.1.g. of this rule are considered to involve a risk to the public health, safety or welfare.

15.6.b. The manufacturer or distributor will be responsible for causing all operations covered by the Shut-down Order to cease and follow all other conditions of the order. At the end of the period of the order, the manufacturer or distributor may resume operations without further action by the commissioner.

15.7. If after a Shut-down Order has been issued the commissioner finds that effective corrective action has not been taken, he may issue a suspension of the Frozen Desserts Manufacturer Permit. The suspension shall state the time that the suspension will become effective, give the reasons for the suspension and specify a time and place for a hearing to be held in this matter. Except that in the case of a summary suspension the commissioner will give the manufacturer the opportunity to request a hearing in this matter subsequent to the notification of the suspension.

15.7.a. All suspensions due to nonconformance to subdivisions 8.1.c., 8.1.d. or 8.1.g. of this rule are summary suspensions.

15.7.b. A suspension of the Frozen Desserts Manufacturer Permit remains in effect until the manufacturer submits and the commissioner accepts a written plan of correction and a request for a reinstatement of the permit.

15.7.c. The commissioner has seven days from the date of receipt of this application to respond to a suspension in the case of violations of subdivisions 8.1.c., 8.1.d. or 8.1.g. of

this rule and fourteen days to respond for all other violations of W. Va. Code §19-11B-1 et seq. or these rules. The commissioner will accept or deny the application for a reinstatement of the permit and will give the terms and conditions under which the permit will be reinstated.

15.8. If the commissioner finds that after the firm has resumed production following a suspension of their Frozen Desserts Manufacturer Permit that effective corrective action has not been taken, then the commissioner will hold a hearing to determine if the Frozen Desserts Manufacturer Permit should be revoked.

15.9. Persons who manufacture a product on an intermittent or infrequent basis, so that the standard enforcement policy cannot apply, will enter into a consent agreement with the commissioner for correction of all items found to be not in conformance with W. Va. Code §19-11B-1 et seq. or these rules.

15.10. Whenever an antibiotic or pesticide residue test is found to be above tolerance, the commissioner shall notify the manufacturer and/or distributor immediately of this fact and shall begin an investigation to determine the cause of the residue. The commissioner shall require that any person found to be responsible for the residue shall correct the cause of the residue prior to the resumption of the manufacturing or distribution of the product.

15.11. A person who performs a recall by voluntarily removing product from sale and distribution in an effective manner so as to limit the potential harm to the health and well-being of the public may be eligible for exemptions from the normal enforcement policy. The commissioner shall consider the facts of each case when making a decision on an exemption.

15.12. The commissioner may apply the enforcement policy in a liberal manner in cases where all official product sample results that involve a product in the form actually sold to the public have been found to be in conformance with W. Va. Code §19-11B-1 et seq. or these rules.

15.13. The commissioner may suspend the standard enforcement policy in cases where such action is necessary to protect the public health, safety or welfare.

15.14. Resamples will only be taken from machines that were shown to be producing violative product the previous visit, except for resamples needed to check that the nonviolative status is being maintained according to the following schedule:

15.14.a. After a first notice and one nonviolative sample, resamples will be taken between 5 to 6 months after the nonviolative sample.

15.14.b. After a second notice and one nonviolative sample, resamples will be taken between 3-4 months after the nonviolative sample.

15.14.c. Other resamples may be considered necessary to determine that the nonviolative status is being maintained."

(hh) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-fourth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (West Virginia apiary law of 1991), are authorized.

(ii) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-fourth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (disposal of dead poultry), are authorized with the amendments set forth below:

On page two, section two, by adding a new subsection to read as follows:

"2.8 "Disposal pit" means an opening dug in the ground to a minimum depth of six feet, containing a minimum capacity of 150 cubic fee, covered with a minimum of 12 inches of dirt, and provided with one or more openings for the introduction of poultry. The openings shall be a minimum size of eight inches

square and equipped with tight lids. A disposal pit shall be located in a site which will prevent contamination of the groundwater or the surface water. This site should conform to the standards established in this rule."

On page two, subsection 3.1 after the word "incinerator," by adding the words "disposal pit,"

And,

On page two, by adding a new section, designated section 4, to read as follows:

**"§61-1C-4. Standards for Site Location for Disposal Pits.**

4.1 No part of a disposal pit system shall be located in a poorly drained or filled area, or in any area where seasonal flooding occurs.

4.2 No part of a disposal pit system shall be located within 10 feet of a building, foundation or property line.

4.3 No part of a disposal pit system shall be located within 50 feet of a public water supply line or within 10 feet of a private water supply system.

4.4 A disposal pit shall be located at least 50 feet from a private well or groundwater supply.

4.5 There shall be a minimum of three feet between the bottom of a disposal pit and seasonal groundwater or rock, shale or any other impermeable layer.

4.6 The evaluation of the site for installation of a disposal pit shall be based upon percolation test results. Percolation tests shall be performed in the following manner:

4.6.1 Location - At least two holes shall be placed over the selected site. The results of these two test holes will be averaged.

4.6.2 Holes shall be dug or bored from six to eight inches in diameter at the site where the disposal pit will be installed. The holes should be at least 24 inches in depth.

4.6.3 The bottom and sides of the holes shall be scratched with a sharp pointed instrument or wire brush to remove any smeared soil surfaces which interfere with the absorption of water into the soil.

4.6.4 Loose dirt shall be removed from the bottom of the test holes and two inches of coarse sand or fine gravel shall be placed into the holes to prevent sealing.

4.6.5 An eight or ten penny nail shall be placed in the wall of each hole exactly six inches above the level of sand or gravel.

4.6.6 The test hole shall be completely filled with water to ground level. Water in the hole shall be kept to a depth of at least 12 inches for a minimum period of four hours before beginning the percolation rate measurement.

4.7 Percolation rate measurement - Upon completion of the above, the water depth in the holes shall be adjusted to the

level of the nail. The number of minutes it takes for this six inches of water (all the water) to be absorbed into the soil shall be accurately determined. This time in minutes, divided by six, gives the rate of fall per inch. The average rate of fall must be between five minutes and 60 minutes."

(jj) The legislative rules filed in the state register on the eighth day of August, one thousand nine hundred ninety-one, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-fourth day of September, one thousand nine hundred ninety-one, relating to the commissioner of agriculture (licensing of livestock dealers), are authorized.

(kk) The legislative rules filed in the state register on the fifteenth day of September, one thousand nine hundred ninety-two, modified by the commissioner of agriculture to meet the objections of the legislative rule-making review committee and refiled in the state register on the nineteenth day of February, one thousand nine hundred ninety-three, relating to the commissioner of agriculture (primary and secondary containment of fertilizers), are authorized.

NOTE: The purpose of this bill is to authorize the Commissioner of Agriculture to promulgate legislative rules relating to primary and secondary containment of fertilizers.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.